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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

94-108

Petition to Extend Rate Regulation)
Filed By The New York State)
Public Service Commission)

PR File No. 94-SP6

To: The Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

OPPOSITION OF McCaw Cellular Communications, Inc.

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OPPOSITION OF McCaw Cellular Communications, Inc.

McCaw Cellular Communications, Inc. ("McCaw"),^{1/} by its attorneys, hereby submits its opposition to the above-captioned petition ("Petition").

Introduction and Summary

In the Second Report and Order,^{2/} the Commission established a sound regulatory foundation for the continued growth and development of commercial mobile radio services ("CMRS"). The Commission correctly concluded in that proceeding that existing market conditions, together with enforcement of other provisions of Title II, render tariffing and rate regulation unnecessary to ensure that CMRS prices are just and nondiscriminatory or to protect consumers. The Commission found that imposing these requirements on cellular and other CMRS providers would not serve the public interest, and that forbearance from unnecessary

^{1/} McCaw provides cellular service to more than 2.5 million subscribers in 24 states, including New York.

^{2/} In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411 (1994) ("Second Report and Order").

regulation of CMRS providers would enhance competition in the mobile services market.^{3/} Finally, the Commission assured that like mobile radio services would be subject to consistent regulatory treatment. Evaluated against these principles, the above-captioned petition must be denied.

First, Congress preempted state rate and entry regulation because it recognized that a patchwork of inconsistent state rules would undermine the growth and development of mobile services, which, by their nature, operate without regard to state boundaries.^{4/} While the statute provides a process for a state to request rate regulatory authority, it sanctions the exercise of that authority only in extreme cases: when significant market failure justifies substituting regulation for the operation of market forces.^{5/} The Commission recognized that state regulation could become a burden to the development of the wireless infrastructure -- and could impede the statutory mandate for regulatory parity. Consistent with the intent of Congress, the Commission established "substantial hurdles" that a state must clear in order to justify rate regulation of CMRS providers.

Second, the NYPSC has failed to make the substantial showing required to justify the authority it seeks in the above-captioned proceeding. Rate regulation is unnecessary in light of

^{3/} Id. at 1467.

^{4/} See H.R. Rep. No. 213, 103d Cong., 1st Sess. 494 (1993) ("Conference Report"); H.R. Rep. No. 111, 103d Cong., 1st Sess. 260 (1993) ("House Report").

^{5/} 47 U.S.C. § 332(c)(3). See also House Report at 261-62 (in reviewing petitions filed by the states, "the Commission also should be mindful of the Committee's desire to give the policies embodies [sic] in Section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice anticipated by the Committee"). In this regard, the Commission should confirm the plain intent of Section 332(c) and preempt state regulation concerning all services offered by a commercial mobile service provider, including enhanced services as well as basic communications services.

current and reasonably foreseeable market conditions. The Commission has already determined that the level of competition in the CMRS marketplace is sufficient to support broad forbearance from rate regulation. The NYPSC has provided no evidence that the level of competition in New York departs significantly from the market conditions relied upon by the Commission, nor has it demonstrated that cellular carriers in New York have exercised market power.

The economic analysis put forward to support New York's claim for regulatory authority is fundamentally flawed. The NYPSC ignores the fact that cellular carriers will soon face competition from so-called enhanced specialized mobile radio systems ("ESMRs") and from licensees using the 120 MHz of spectrum recently made available for PCS; it ignores declining prices for cellular service and the substantial recent growth in subscribership and investment by cellular carriers; it attempts to "prove" market concentration by using analytical tools intended to evaluate mergers rather than the appropriateness of regulation; and, in concluding that cellular carriers have enjoyed "excess" earnings, fails to recognize the scarcity value of the electromagnetic spectrum. At most, the NYPSC's economic analysis demonstrates only the CMRS marketplace is not perfectly competitive. But, as the Commission itself has acknowledged, perfect competition is not a necessary prerequisite for forbearance.

Third, the NYPSC fails to demonstrate that consumers would benefit from regulation. Price controls limit the ability of regulated firms to respond to changes in technology and in cost and demand conditions. Rate regulation also deters new investments, improvements in service quality, and new entrants in the marketplace. By seeking to impose rate regulation solely on cellular operators, moreover, the NYPSC would reestablish the very regulatory disparities that

last year's comprehensive amendment of Section 332(c) of the Communications Act was intended to correct.

The public interest is better served by the regulatory forbearance embodied in the Second Report and Order and the introduction of additional competition through the allocation of new spectrum for CMRS, and Congress intended for these policies to be given "adequate opportunity to yield the [anticipated] benefits of increased competition and subscriber choice" before state rate regulation was imposed on CMRS providers.^{6/} Given the acknowledged harms from such regulation and the NYPSC's failure to demonstrate the need to impose price controls on cellular carriers, the Petition should be denied.^{7/}

I. SECTION 332(c) AND THE SECOND REPORT AND ORDER IMPOSE AN EXTREMELY DEMANDING STANDARD FOR THE AUTHORIZATION OF STATE REGULATION OF CELLULAR SERVICES

In evaluating the NYPSC Petition, the Commission must resist the invitation of New York to engage in a de novo analysis of competition in cellular markets and the appropriate regulatory framework for addressing these market conditions. The Second Report and Order clearly sets forth the Commission's general analysis with respect to the level of competition in cellular markets, and makes fundamental policy choices with respect to appropriate regulation. These fundamental policy decisions, as well as the framework established by the Section 332(c),

^{6/} House Report at 261.

^{7/} It is important to bear in mind that denial of the petition does not foreclose state regulatory authorities from returning to the Commission at a later date should evidence appear that consumers are indeed being injured because rate regulation is not being exercised at the state level. Thus, the burden of proof is properly placed on the petitioning state to show why free market forces should not be given a chance to operate now.

dictate that the grant of state petitions to permit rate or tariff regulation should be very much the exception rather than the rule.

In any petition for rate regulation authority, the statute and the Commission's rules clearly place the burden on the petitioning state to justify the need for such authority. New York has failed to meet that burden. Rather, there appears to be little basis for the NYPSC's Petition other than other than a regulatory philosophy and a set of underlying assumptions that are fundamentally at odds with the basic framework adopted by the Commission in the Second Report and Order.^{8/} In the absence of the proof required by the Commission, the NYPSC's Petition must be rejected.

The Commission has already determined that the level of competition in the CMRS marketplace, together with enforcement of other provisions of Title II, render tariffing and rate regulation unnecessary to ensure that CMRS prices are just and nondiscriminatory or to protect consumers.^{9/} Inasmuch as the Commission did not insist on perfect competition as a prerequisite for deregulation,^{10/} the "substantial hurdle" to be met by states seeking to regulate cellular services cannot be satisfied with NYPSC's dubious evidence of market imperfections or less than fully competitive conditions. Rather, the Second Report and Order suggests a three-part test, with each state required to meet its burden of proof on each part of the test.

^{8/} In this regard, it is noteworthy that two of the states filing petitions both opposed forbearance from regulation at the federal level, in addition to seeking to preserve state authority. See Comments of the State of California in Gen. Docket No. 93-252; Comments of the State of New York in Gen. Docket No. 93-252.

^{9/} Second Report and Order at 1467.

^{10/} See, e.g., id. at 1472.

First, to support a petition for rate authority, the petitioning state must show that market conditions unique to that state are substantially less competitive and substantially more likely to cause harm to consumers than the market conditions that have been found generally to support the Commission's decision to forbear from rate and tariff regulation. Second, since the Commission expressly relied upon the continuing applicability of Section 201 and 202's requirements for just, reasonable, and not unreasonably discriminatory rates, and the availability of the complaint procedure under section 208 to address any residual competitive problems, the NYPSC must demonstrate that whatever unique competitive problems it has identified cannot be adequately addressed through these federal remedies. Finally, in the unlikely event that a state can satisfy the factors described above, it must also show that any residual risks to consumers, *i.e.*, the marginal benefits of the proposed state regulation, outweigh the substantial costs associated with regulation. As a threshold matter, of course, the state must also "identify and provide a detailed description of the specific existing or proposed rules that it would establish if [the Commission] were to grant [the state's] petition."^{11/} Approval of a state petition that fails to meet this test would contravene the statutory framework, resulting in the imposition of rate regulation under circumstances in which the Commission itself has found such regulation to be unnecessary and counterproductive.

A. State Regulation Is Presumptively Inconsistent With The Objectives Of Section 332(c) As Implemented By The Commission

Congress' adoption of amendments to Section 332 in the Budget Act was based upon three overarching policy objectives: first, the need for symmetrical regulation of competitive

^{11/} Second Report and Order at 1505.

service providers, notwithstanding the anachronistic regulatory categories of the past; second, the need for a consistent and coherent national regulatory framework for mobile services, which by their nature are not confined by state boundaries; and third, the need to minimize regulatory distortions of free market competition so that competitive success is dictated not by regulation but by success in meeting the needs of consumers. State regulation in general, and regimes that regulate only cellular carriers in particular, of the sort proposed by New York are inherently inconsistent with these objectives. Fidelity to the statutory framework, as interpreted by the Commission in the Second Report and Order, dictates a very substantial burden of proof on the states to justify any proposed state regulation.

With respect to the first objective, Congress revised Section 332 because it found that the regulatory structure governing mobile services -- which permitted "private" mobile services to escape regulation while functionally equivalent "common carrier" services were subject to state as well as Federal rules -- could "impede the continued growth and development of commercial mobile services and deny consumers the protections they need."^{12/} Congress recognized that the implementation of original Section 332 had created a cockeyed marketplace in which ESMR licensees, but not their cellular competitors, were exempt from Title II of the Communications Act and from state regulation, and where radio common carriers were forced to compete against private carrier paging operators that faced essentially no regulation at the Federal or state level.^{13/}

^{12/} House Report at 260.

^{13/} See id. at 260 & n.2.

In the Second Report and Order, the Commission appropriately emphasized these considerations in fashioning critical elements of the regulatory scheme for commercial mobile radio services. Thus, the Commission concluded that its elaboration of the elements of the commercial mobile radio service definition would

ensure[] that competitors providing identical or similar services will participate in the marketplace under similar rules and regulations. Success in the marketplace thus should be driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs -- and not by strategies in the regulatory arena. This even-handed regulation, in promoting competition, should help lower prices, generate jobs, and produce economic growth.^{14/}

Both Congress and the Commission expressed serious concern, however, that this "even-handed regulation" could be disrupted by state regulation. The legislative history of the Budget Act instructs the Commission to "ensure that [state] regulation is consistent with the overall intent...that, consistent with the public interest, similar services are accorded similar regulatory treatment."^{15/} The Commission echoed this concern in observing that "our preemption rules will help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our federal mandate for regulatory parity."^{16/}

The NYPSC Petition proposes exactly the sort of regulation which Congress feared, and which the Commission sought to avoid in adopting its preemption rules. By proposing only to regulate cellular carriers, the State of New York has in essence proposed to maintain at the state

^{14/} Second Report and Order at 1420.

^{15/} Conference Report at 494.

^{16/} Second Report and Order at 1421.

level exactly the sort of asymmetrical regulation which led to the adoption of the amendments to Section 332 in the first place.

It is equally clear that state regulation is presumptively incompatible with Congress' express desire for uniform national regulation of commercial mobile services. Enactment of revised Section 332 was guided by a recognition that Federal jurisdiction was the most appropriate regulatory locus for mobile services "that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."^{17/} Again, the Second Report and Order was careful to carry out this objective. As the Commission observed,

[W]e have engendered a stable and predictable federal regulatory environment, which is conducive to continued investment in the wireless infrastructure. Our definition of CMRS not only represents fidelity to congressional intent, but also establishes clear rules for the classification of mobile services, minimizing regulatory uncertainty and any consequent chilling of investment activity.^{18/}

State regulation of the sort proposed by New York also undermines Congress' express instruction that the Commission carefully consider whether market conditions justify forbearance from most forms of regulation under Title II of the Communications Act. In interpreting this mandate, the Commission established "as a principal objective, the goal of ensuring that unwarranted regulatory burdens are not imposed upon any mobile radio licensees who are classified as CMRS providers..."^{19/} Thus, the Commission concluded that

^{17/} House Report at 260. See also Conference Report at 490 (intent of revised Section 332 is to "establish a Federal regulatory framework to govern the offering of all commercial mobile services") (emphasis supplied).

^{18/} Second Report & Order at 1421 (emphasis supplied).

^{19/} Id. at 1418 (emphasis supplied).

In deciding whether to impose regulatory obligations on service providers under Title II, we must weigh the potential burdens of those obligations against the need to protect consumers and to guard against unreasonably discriminatory rates and practices. In making this comparative assessment, we consider it appropriate to seek to avoid the imposition of unwarranted costs or other burdens upon carriers because consumers and the national economy ultimately benefit from such a course.^{20/}

Further, the Commission emphasized the need to

ensur[e] that regulation is perceived by the investment community as a positive factor that creates incentives for investment in the development of valuable communication services -- rather than as a burden standing in the way of entrepreneurial opportunities -- and by establishing a stable, predictable regulatory environment that facilitates prudent business planning.^{21/}

The same factors which militate strongly against regulation at the federal level militate equally strongly against burdensome regulation at the state level.

In light of these Congressional objectives, and the policy decisions embodied in the Second Report and Order, the Commission properly established a strong presumption against granting state petitions for authority to regulate commercial mobile services, including cellular services. The Commission acknowledged that Congress made a fundamental choice "generally to preempt state and local rate and entry regulation of all commercial mobile radio services..."^{22/} The Commission thus "vigorously implemented the preemption provisions of

^{20/} Id. at 1419.

^{21/} Id. at 1421.

^{22/} Id. at 1504 (emphasis supplied).

the Budget Act,"^{23/} by requiring that states "clear substantial hurdles if they seek to continue or initiate rate regulation of CMRS providers."^{24/}

Beyond these clear, if general, statements, the Commission's substantive analysis of competition in cellular markets and the appropriateness of regulation establishes several important benchmarks for evaluating state showings. Based on the Commission's analysis and conclusions, McCaw submits that the states must provide conclusive proof on three independent issues before a Petition to retain or impose regulation may be granted.

B. New York Must Demonstrate That Prevailing Market Conditions In New York Are Substantially Less Competitive Than The Commission Found Generally; That Federal Remedies Are Inadequate To Address Such Conditions; And That Any Residual Benefits Of State Regulation Outweigh The Costs Of Regulation Recognized By The Commission

The NYPSC's Petition cannot be evaluated in a vacuum. Rather, the Commission must take as the starting point for its analysis the policy decisions and conclusions already made in the Second Report and Order. The NYPSC loses sight of the fact that the Commission has already considered whether competitive conditions in cellular markets warrant various forms of regulation, and found that they do not. The Commission has also held that the regulatory framework it has adopted should suffice to remedy competitive abuses or unjust and discriminatory rates. Finally, the Commission has generally found that rate, entry and tariff regulations, as a general matter, are costly and burdensome and should be avoided wherever possible. Each of these findings strongly reinforces the presumption against state regulation. Looked at another way, in order to justify state regulation, New York must be required to

^{23/} Id. at 1419.

^{24/} Id. at 1421.

produce evidence that each of these general conclusions is not warranted with respect to the unique conditions in that state. If, on the other hand, New York fails to carry its burden of proof on each of these issues, its Petition must be denied.

The NYPSC's Petition attempts to establish that the market for provision of cellular service in New York is less than fully competitive. While this Opposition will conclusively demonstrate that none of this evidence supports such a conclusion, it is critical to keep in mind that the Commission adopted its forbearance regime even though it was unable to conclude, on the record before it, that cellular markets were fully competitive. Thus, after an extended discussion of the record with respect to the competitiveness of cellular markets, the Commission concluded that

[i]n summary, the data and analyses in the record support a finding that there is some competition in the cellular services marketplace. There is insufficient evidence, however, to conclude that the cellular services marketplace is fully competitive.^{25/}

Despite the Commission's unwillingness to find that the cellular market was "fully competitive" on the record before it, the Commission expressly refused to find that the competitive imperfections in these cellular markets warranted tariff, entry or rate regulation. To the contrary, the Commission found that the record established that "there is sufficient competition in this marketplace to justify forbearance from tariffing requirements."^{26/} Similarly, the Commission observed that "there is no record evidence that indicates a need for full-scale regulation of cellular or any other CMRS offerings."^{27/}

^{25/} Second Report and Order at 1472.

^{26/} Id. at 1478.

^{27/} Id. (emphasis supplied)

As a legal matter, by expressly forbearing from entry, rate or tariff regulation of cellular services, the Commission found, under the statutory standard, that such regulation was "not necessary to ensure that the charges, practices, classifications, or regulations for or in connection with CMRS are just and reasonable and are not unjustly or unreasonably discriminatory"^{28/} and that such provisions are "not necessary for the protection of consumers."^{29/} This is the same standard applicable to state petitions for rate regulatory authority.^{30/} A state cannot satisfy this standard merely by submitting evidence that competition in cellular markets is less than perfect. Rather, states must be required to show that market conditions in their state are substantially less competitive than those which the Commission found not to justify regulation at the federal level.

Even if a state succeeds in demonstrating the existence of competitive conditions worse than those already considered by the Commission, which New York has not, this does not end the inquiry. In deciding to forbear from regulation at the federal level, the Commission found that

continued applicability of Sections 201, 202 and 208 will provide an important protection in the event there is a market failure. . . . In the event that a carrier violate[s] Sections 201 [requiring interconnection] or 202 [prohibiting unjust and unreasonable rates and practices], the Section 208 complaint process would permit challenges to a carrier's rates or practices and full compensation for any harm due to violations of the Act.^{31/}

The requirement of just, reasonable, and nondiscriminatory rates and the ongoing availability of the complaint process serve also to remedy potential abuses that may arise in the

^{28/} Id.

^{29/} 47 U.S.C. § 332(c)(1).

^{30/} Compare id. with 47 U.S.C. § 332(c)(3).

^{31/} Second Report and Order at 1478-79.

states. In order to support a finding that state regulation is necessary to protect consumers from unjust and unreasonable rates or discrimination, a state must demonstrate that the Federal requirements and procedural remedies preserved in Section 332(c) are inadequate to eliminate any abuses or potential for abuse proven by that state. New York has failed to do so.

Even if a state were able to demonstrate unique competitive conditions and that Federal law is insufficient to address these conditions -- a showing that none of the petitioning states has satisfied -- the state must make the further showing that, on balance, state regulation is an appropriate response and produces net benefits. As the Commission has recognized time and again, the mere fact that regulation has benefits does not end the inquiry. As the Commission observed in the context of tariffing requirements, regulation "imposes administrative costs and can [itself] be a barrier to competition in some circumstances."^{32/}

The Second Report and Order itself identified substantial costs associated with tariffing, one of the major regulatory requirements proposed by New York,^{33/} and found that "[i]n light

^{32/} Second Report and Order at 1479.

^{33/} The Commission observed

[i]n a competitive environment, requiring tariff filings can (1) take away carriers' ability to make rapid, efficient responses to changes in demand and cost, and remove incentives for carriers to introduce new offerings; (2) impede and remove incentives for competitive price discounting, since all price changes are public, which can therefore be quickly matched by competitors; and (3) impose costs on carriers that attempt to make new offerings.... tariff filings would enable carriers to ascertain competitors' prices and any changes to rates, which might encourage carriers to maintain rates at an artificially high level. Moreover, tariffs may simplify tacit collusion as compared to when rates are individually negotiated, since publicly filed tariffs facilitate monitoring.... [T]ariffing, with its attendant filing and reporting requirements, imposes administrative costs upon

of the social costs of tariffing, the current state of competition, and the impending arrival of additional competition, particularly for cellular licensees, forbearance from requiring tariff filings from cellular carriers, as well as other CMRS providers, is in the public interest."^{34/} A state seeking to impose regulation must show that any benefits to state regulation outweigh these costs. The NYPSC's Petition fails to make these showings. As demonstrated below, its Petition must be denied.

II. THE NYPSC HAS FAILED TO DEMONSTRATE THAT RETENTION OF STATE REGULATION IS NECESSARY TO PROTECT CONSUMERS

A. The NYPSC Seeks General Authority To Extend Its Regulation Of Cellular Carriers

The NYPSC seeks authority to continue to regulate cellular carriers because "[u]nder state law, market conditions with respect to [CMRS] 'fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory.'"^{35/}

The NYPSC's evidence that cellular rates are unjust and unreasonable or unjustly and unreasonably discriminatory is "mixed" at best.^{36/} The NYPSC itself acknowledges that cellular rates are declining,^{37/} and has elsewhere determined that cellular service "is furnished

carriers. These costs could lead to increased rates for consumers and potential adverse effects on competition.

Id.

^{34/} Id.

^{35/} NYPSC Petition at 2.

^{36/} NYPSC Petition at 4.

^{37/} NYPSC Petition at 8.

competitively, for the market structure is one that has been designed by the FCC to be competitive."^{38/} The NYPSC also concluded that

the existence of resellers -- compounded by the existence of significant excess capacity -- operates to check monopoly abuses of the facilities-based carriers and reduce the potential for a duopoly. Our experience, which shows that these carriers do not need to be regulated, as well as that of more than half the states, which have deregulated or vastly reduced regulation of cellular service, also supports our conclusion that this market is competitive.^{39/}

Based on these findings, the NYPSC has stated that it would seek legislation to suspend most aspects of the law requiring regulation of cellular carriers, including rate and entry regulation.^{40/}

Now, the NYPSC contends that regulation is necessary.^{41/} Contrary to its own prior findings and the Commission's holding in the Second Report and Order, it argues that a market consisting of only two providers of service cannot be fully competitive and that anything less than full competition requires regulation.^{42/} The Petition is not supported by the evidence the

^{38/} Proceeding on Motion of the Commission to Review Regulatory Policies for Segments of the Telecommunications Industry Subject to Competition, Case 29469, Opinion No. 89-12, 29 NYPSC 421, 103 P.U.R. 4th 1, slip op. at 9 (1989).

^{39/} Id.

^{40/} Id. See also State of New York, Report of the New York Telecommunications Exchange, "Connecting to the Future, Greater Access, Services and Competition in Telecommunications," 13 (1993).

^{41/} NYPSC Petition at 3.

^{42/} NYPSC Petition at 2-3. The NYPSC relies on the following as further evidence that existing market conditions require rate regulation: (1) cellular rates are considerably higher than landline rates, (2) cellular companies earn high profits, (3) there is high concentration within individual MSAs, (4) cellular service is becoming an essential service, (5) consumer complaints are increasing, and (6) cellular rates appear to be declining. As discussed below, evidence of a less than fully competitive CMRS market does not suffice to justify state regulation.

NYPSC presents. The NYPSC also fails to adequately describe the existing cellular regulation that it seeks to extend,^{43/} as required by the Commission's rules.

The New York Petition also suffers from a separate and overriding deficiency. It fails to provide any factual evidence that the regulatory program which the NYPSC desires to extend would provide any benefits whatsoever to the public, much less outweigh its costs, even if the degree of competition in the current cellular market were as limited as the NYPSC erroneously alleges. It is not enough to claim, as the NYPSC does, that it has avoided practices which "threaten vigorous competition in the wireless market."^{44/} Section 332(c) and the Second Report and Order reflect a strong presumption against state rate regulation that can only be overcome by a strong showing that such regulation is necessary. This the NYPSC has failed to do.

B. The NYPSC's Economic Analysis Fails To Justify The Imposition of Rate Regulation On Cellular Providers

1. The NYPSC Fails To Demonstrate That Current Market Conditions Justify Its Change In Position Regarding The Degree Of Competition In The Cellular Market

In 1989 the NYPSC determined that the cellular market was sufficiently competitive to warrant suspension of regulation. This decision was based on a cellular market that had carriers licensed and operating in only eleven of the seventeen Cellular Geographic Service Areas ("CGSAs").^{45/} Today, each of the seventeen CGSAs is served by two carriers, and as of June

^{43/} NYPSC Petition at 6.

^{44/} NYPSC Petition at 11-12.

^{45/} Opinion No. 89-12, slip op. at 8, supra, n.38. At the time of the NYPSC's review of competition in the cellular market, the Commission had not licensed carriers for the rural services areas.

1994, there were 32 cellular resellers in New York.^{46/} Although the NYPSC now dismisses the presence of resellers in the market as relevant to determining effective competition,^{47/} it previously relied on the presence of resellers in reaching its decision that cellular carriers do not need to be regulated.^{48/}

In addition to an increase in the number of providers, since 1989 the industry has experienced significant growth in network capacity and coverage, and in subscribers.^{49/} In the particular case of Cellular One of New York, the nonwireline carrier owned by McCaw's LIN Broadcasting subsidiary, capital investment has more than quadrupled since 1990, and cell sites now number more than 300 -- a tenfold increase during the past 8 years. Similarly, subscribership has risen tenfold over the same period. This increase of providers, subscribers and infrastructure investment, coupled with declining service rates, indicates that the NYPSC was correct initially in finding that cellular carriers are vigorously pursuing the market and do not need to be regulated.^{50/} The NYPSC does not offer any evidence to refute its previous conclusions.

^{46/} NYPSC Petition at 5.

^{47/} NYPSC Petition at n.2.

^{48/} Opinion No. 89-12, slip op. at 9.

^{49/} From 1989 to 1993, the number of cell sites grew nationally from 4,169 to 12,805. "The Wireless Fact Book", CTIA at 13 (Spring 1994). Cellular subscribers during this same period grew from 3,500,000 to 16,000,000. Id. at 1.

^{50/} Supra, n.38.

2. Landline Rates Lower Than Cellular Rates Do Not Support A Finding Of Anticompetitive Behavior In The CMRS Market

The NYPSC's comparison of cellular rates with landline rates is immaterial for purposes of determining competition in the cellular market.^{51/} The fact that landline rates are much lower than cellular rates is irrelevant to the determination of the reasonableness of cellular rates.^{52/} At most, this suggests that landline and cellular services are not in the same antitrust product market, but it does not suggest that the markets in which cellular services are sold are not competitive.^{53/}

The NYPSC also claims that the average rates of return on equity for cellular carriers are too high in comparison with regulated returns for landline companies and unregulated returns for high tech companies.^{54/} It is unclear by any evidence how the NYPSC's rates of return on equity were computed or whether they were computed in a consistent manner.^{55/} Regardless, these comparisons of the rates of return on equity do not determine whether cellular companies are exercising market power.^{56/}

^{51/} NYPSC Petition at 8.

^{52/} Owen Declaration at ¶ 48.

^{53/} Cellular services would be competitive with additional landline services but for the fact that residential local exchange services are priced below costs. For those customers with relatively long local loops, landline service costs are likely to be similar to or greater than cellular service costs. Owen Declaration at ¶ 15.

^{54/} NYPSC Petition at 8-9.

^{55/} Owen Declaration at ¶ 53.

^{56/} Id.

The NYPSC's calculations of rates of return on equity are problematic for several reasons. The measures of capital used to compute the rates of return are not appropriate for economic analysis.^{57/} At the very least, replacement cost should be used, not book values, and intangible assets should be included.^{58/} New entrants, for example, operate at a loss initially. Such start-up losses should be capitalized and included in a firm's rate base.^{59/} Accounting rates of return, moreover, usually ignore the fact that spectrum is a scarce asset that belongs in the rate base.^{60/} Due to the scarce availability of spectrum for cellular carriers, the only practical way to achieve an efficient allocation of cellular spectrum is to price services at a level that covers opportunity costs in terms of foregone or degraded services for other cellular customers.^{61/}

Even if income and capital were properly measured, simple comparisons of rates of return are likely to be misleading.^{62/} A high ratio of income to capital is irrelevant unless an industry is in long-run equilibrium, which the cellular industry is not.^{63/} Even in long-run equilibrium, the ratio of profits to equity capital will depend considerably on risk, which varies

^{57/} Id. at ¶ 55.

^{58/} Id.

^{59/} Id.

^{60/} Id.

^{61/} Id.

^{62/} Id. at ¶ 54.

^{63/} Id.

among industries.^{64/} Finally, in long-run equilibrium, what is expected to be equalized are expected rates of return, not the particular rates of return actually earned in any particular year or set of years.^{65/}

3. The NYPSC's Attempt To Impose Dominant/Non-Dominant Distinctions Contravenes Conclusions By Congress And The FCC

The NYPSC also argues that because one carrier has a market of 70% to 80% in three MSAs, such a carrier may be dominant and have "the incentive and opportunity to engage in anticompetitive pricing."^{66/} Contrary to this conclusion, neither Congress nor the FCC chose to rely on the dominant/non-dominant distinction in regulating CMRS. Section 332(c) does not require the Commission first to classify a commercial mobile service provider as "non-dominant" to justify forbearance. Congress was well aware of the dominant/non-dominant distinction when it enacted Section 332(c).^{67/} Nonetheless, when House-Senate conferees added the requirement that the Commission evaluate market conditions before it decided to forbear,^{68/} they did not limit forbearance to carriers that had been declared "non-dominant." Rather, they required only that the Commission determine that forbearance will "promote competition among providers of commercial mobile services."^{69/} In the Second Report and Order, the Commission determined

^{64/} Id.

^{65/} Id.

^{66/} NYPSC Petition at 9.

^{67/} See, e.g., House Report at 260-61 (stating that the Committee was "aware" of the court decision voiding the "Commission's long-standing policy of permissive detariffing, applied to non-dominant carriers").

^{68/} See 47 U.S.C. § 332(c)(1)(C).

^{69/} 47 U.S.C. § 332(c)(1)(C); see also Conference Report at 491.

that cellular providers "face sufficient competition" to justify the relaxation of certain rules traditionally applied in non-competitive markets.^{70/}

A state should be permitted to regulate comparable mobile services differently only to the extent the Commission has likewise established separate regulatory classifications of commercial mobile service providers. Congressional intent on this point is explicit.^{71/} Where the Commission has determined that dissimilar regulation of mobile service providers is inconsistent with the growth and nationwide development of a competitive market for commercial mobile services, a state should not be permitted to establish such dissimilar regulation under color of Section 332(c)(3). Such a result would effectively substitute a patchwork of state-imposed regulatory classifications for the uniform Federal regulatory framework adopted by Congress, thereby undermining fair competition and the growth and development of commercial mobile services.

In any case, the NYPSC has failed to justify the need for such distinction. A high market share, standing alone, is insufficient for a firm to be dominant or to exercise market power.^{72/} A carrier is not dominant if it faces one or more rivals that could rapidly expand their sales and market share in response to anticompetitive behavior by the larger firm.^{73/} The

^{70/} Second Report and Order at 1470 (citing Cellular CPE Bundling Order, 7 FCC Rcd at 4028-29). See also Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (Fifth Report and Order), 98 FCC 2d 1191, 1204, n.41 (1984) (emphasizing that cellular carriers' "ability to engage in anticompetitive conduct or cost-shifting appears limited").

^{71/} See id.

^{72/} Owen Declaration at ¶ 42.

^{73/} Id.